Supreme Court, U.S.
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No. 87-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ETHEL B. MILLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Commissioner of Internal Revenue incorrectly interpreted Section 170 of the Internal Revenue Code of 1954 in reversing seven decades of prior IRS policy and disallowing charitable contribution deductions for payments made by individual Scientologists solely to participate in religious services of their faith.

II. Whether denying charitable contribution deductions under Section 170 for payments to participate in their faith's religious sacraments by Scientologists violates the religion clauses of the first amendment.

RULE 21.1(b) LIST OF PARTIES

In addition to the named petitioner, Ethel B. Miller, other parties who will be bound by the judgment in the court below are as follows:

1. Robert DeSimone
   Cathy DeSimone
2. Sally P. Lentz
3. Robert Tillett

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ETHEL B. MILLER,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Ethel B. Miller respectfully prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled matter on September 18, 1987 and the order of that court denying the petition for rehearing entered on November 9, 1987.

OPINIONS BELOW

The opinion of the court of appeals in this matter is reported at 829 F.2d 500 and is reprinted in the Appendix to this petition (1a).[1] The order denying rehearing

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[1] References in this petition are indicated as follows:

To the numbered pages of the Appendix to this petition (——a;) To the volume number and numbered pages of a four-volume Stipulated Record on Appeal, filed in the court below (Stip. Rec. ————); To the numbered pages of the Appendix filed with petitioner's main brief in the court below (A ——).

is not reported but is reprinted in the Appendix (16a). The opinion of the United States Tax Court in the case designated by the parties as providing factual and legal findings in this case is reported as *Graham v. Commissioner*, 83 T.C. 575 (1984) and is reprinted in the Appendix (32a). The Order and Decision of the Tax Court in petitioner's case is also reprinted in the Appendix (29a).

JURISDICTION

The judgment of the court of appeals (for which jurisdiction was invoked under 26 U.S.C. § 7482(a)) was entered on September 18, 1987 and a timely filed petition for rehearing and suggestion for rehearing *en banc* was denied by order entered on November 9, 1987 (16a). By order dated January 25, 1988, Chief Justice Rehnquist ordered that the time for filing this petition be extended to and including March 3, 1988 (44a).

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Internal Revenue Code of 1954 (26 U.S.C.) § 170—Charitable, etc., Contributions and Gifts [2]

(a) Allowance of deduction.

(1) General rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection

[2] Only those portions of 26 U.S.C. § 170 and 26 U.S.C. § 501 relevant to the discussion in this petition are set forth here. References to Title 26 United States Code are to the Internal Revenue Code of 1954, which was in effect when the tax returns at issue in

(c)) payment of which is made within the taxable year. * * *

(b) Percentage limitations.

(1) Individuals.—In the case of an individual, the deduction in subsection (a) shall be limited as provided in the succeeding subparagraphs.

(A) General rule. Any charitable contribution to—

(i) a church or a convention or association of churches.

* * * *

shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year.

(c) Charitable contribution defined. For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of:

* * * * *

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

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this case and related cases were filed and when the Commissioner's notices of deficiency were issued. As part of the Tax Reform Act of 1986, the 1954 Code was redesignated the Internal Revenue Code of 1986. Pub. L. 99-514 § 2(a), 100 Stat. 2085, 2095. The portions of Sections 170 and 501 of the 1954 Code pertinent to this case were not changed by the Tax Reform Act of 1986 and remain in force in identical form.

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * *

Internal Revenue Code of 1954 (26 U.S.C.)
§ 501—Exemption From Tax on Corporations, Certain Trusts, Etc.

(a) Exemption From Taxation. An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

* * * *

(c) List of Exempt Organizations. The following organizations are referred to in subsection (a):

* * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempt-

ing, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

* * * *

STATEMENT OF THE CASE

The Nature of the Proceedings

Petitioner Ethel B. Miller was denied an income tax deduction of $3,638.18 in payments for contributions to her church, the Church of Scientology, and was assessed a tax deficiency in the amount of $256 for the tax year 1982. (A 3, 5-6).

Along with hundreds of similarly situated Tax Court petitioners who had contributed sums of money to various churches and missions of the same religious denomination, petitioner waived trial and, subject to her right of appeal, agreed to be bound by the outcome of similar "test" cases. The Commissioner of Internal Revenue (the "Commissioner") and the petitioner stipulated in the Tax Court that such designated cases were typical and that, to the extent relevant, the record of those cases was to be incorporated into the record of all proceedings in petitioner's case (A 7-8) (30-31a).

This case has arisen in a somewhat unique procedural posture. As indicated, both parties below agreed to be bound, subject to the right of appeal, by the relevant factual and legal findings of the Tax Court in a designated case, *Graham v. Commissioner*, 83 T.C. 575 (1984). The Tax Court ruled in favor of the Commissioner in *Graham*, and on the authority of that decision entered its judgment in favor of the Commissioner in petitioner's Tax Court case. (29a). Petitioner then filed a timely notice of appeal from the Tax Court's decision and appealed to the United States Court of Appeals for the Fourth Circuit which affirmed the decision of

the Tax Court. *Miller v. Internal Revenue Service*, 829 F.2d 500 (1987) (1a).

Appeals similar to petitioner's have been decided by or are pending in all other United States Courts of Appeals except the appellate courts for the District of Columbia and the Federal Circuit.

Three other courts of appeals have issued opinions in appeals based on records identical to that of the instant case and raising the same legal issues. Like the Fourth Circuit in this case, panels of the First and Ninth Circuit affirmed the Tax Court's decision. *Hernandez v. Commissioner*, 819 F.2d 1212 (1st Cir. 1987) and *Graham v. Commissioner*, 822 F.2d 844 (9th Cir. 1987). The Eighth Circuit, however, expressly rejected the First Circuit's analysis and reversed the Tax Court, holding that similar payments were properly deductible. *Staples v. Commissioner*, 821 F.2d 1324 (8th Cir. 1987). The Commissioner unsuccessfully sought rehearing in the Eighth Circuit in *Staples* and has filed a petition for certiorari in this Court. No. 87-1382 filed February 19, 1988.

In *Hernandez*, the taxpayer, represented by the undersigned, filed his petition for a writ of certiorari in this Court on December 11, 1987 (No. 87-963). In *Graham*, the taxpayers, also represented by the undersigned, intend to file a petition of certiorari; that petition is due on or before March 30, 1988. In its petition in *Staples*, the government has stated that it does "not intend to oppose" the taxpayers' petition in *Graham*. Petition for Certiorari in *Staples*, No. 87-1382 at 9.

Statement of Facts

The parties have stipulated that Scientology, the faith whose sacraments are at issue here, is a religion (27a, ¶ 52) and that the recipients of the contributions, the relevant Scientology missions and churches, were, at all relevant times, churches within the meaning of Internal Revenue Code § 170(b)(1)(A)(i) and tax-exempt religious organizations under § 501 of the Code eligible to

receive contributions deductible under § 170. (27-28a, ¶ 53.).[3]

The payments at issue in this case are made for the core religious practice of the Church of Scientology known as "Auditing." Specifically, the record, through the detailed stipulations of fact, established that parishioners of Scientology are taught that "the individual is an immortal spirit who has a mind and a body" and "that the highest level of spiritual ability and awareness can be obtained only by progressing on a step-by-step basis through lower and intermediate levels of Auditing." (20a, ¶ 16). "Every Auditing session is structured and conducted in exact accordance with rituals, codes, doctrines and tenets of Scientology" (20a, ¶ 15). No subject matter is taught, studied or learned during auditing. (21a, ¶ 23). Dr. Thomas Love, a professor of religious studies at California State University at Northridge, California, gave his uncontradicted expert opinion that "auditing," the service for which the bulk of contributions involved were made, is "the essential religious experience of the Church of Scientology," comparable to beliefs and practices in Eastern religions, specifically Hinduism and Buddhism. (Stip. Rec. III, 390-396.)

The Church of Scientology engages in another religious practice also at issue here known to Scientologists as "training." In training parishioners study "the doctrines, tenets, codes, policies and practices of Scientology" (21a, ¶ 24), and study the scriptures of Scientology to the exclusion of all other materials. (Stip. Rec. II 206, 219, 225-26, 229. As part of training, a person may audit others. (Stip. Rec. I 19-20, 112, 140; II 219, 222). The purpose of undergoing training is to achieve religious enlightenment and the ability to help others (including the ability to audit another person). Dr. Love gave un-

[3] The parties' stipulations in *Graham v. Commissioner*, incorporated by reference in the proceedings below, are reprinted in the Appendix to this petition (18a).

contradicted expert testimony that "training" is a form of religious observance, comparable to devotional study of sacred texts in the Buddhist and Judaic traditions (Stip. Rec. III 400-404). Scientologists believe that the spiritual benefits and awareness derived from auditing and training accrue not only to the individual but also extend to the public at large. (Stip. Rec. II 213-14, 223, 238, 260-61, 274-75, 298.)

In accordance with those stipulations and testimony, the Tax Court found the practices at issue to be religious. *Graham v. Commissioner*, 83 T.C. at 580 (38, 39a) ("[P]etitioners wanted to receive the benefit of various religious services provided by the Church of Scientology").

The Churches of Scientology have established charges for auditing and training and refer to the payments of such charges as "fixed donations" or "fixed contributions." (23a, ¶ 36). Such fixed donations are the payments at issue here. (24a, ¶ 40). Auditing is given in sessions. An "Intensive" is a specific number of hours—12½ or 25—of Auditing intended to be given over a short period of time. (21a, ¶ 21). Fixed donations are sometimes made for an Intensive of 12½ or 25 hours of Auditing. (23a, ¶ 37). These donations, which are based upon a religious tenet of Scientology called the Doctrine of Exchange, constitute the source of most of the funds of the Churches of Scientology and are used to pay the costs of church operations and activities. (23-24a, ¶ 39). See also Stip. Rec. II 244-47, 294-95.) [4] Amounts of fixed

[4] The Doctrine of Exchange is based upon early writings of the Founder of the Church of Scientology concerning the need to balance inflow and outflow (or, put another way, the need to give as well as receive.) (Stip. Rec. II 244-45, 297-98). A person must outflow to maintain a balance and to be an ethical Scientologist. (Stip. Rec. II 297-98). A person who receives but does not contribute or exchange something in kind will suffer spiritual decline. (Stip. Rec. II, 244, 297-98). The Doctrine of Exchange operates in many personal realms of a Scientologist's life, including, for exam-

donations have been set historically at levels that correspond roughly to a percentage of the income of church members. For example, the Tax Court below found that 25 hours of auditing has historically been set at the equivalent of three months' pay for average middle class church members. *Graham*, 83 T.C. at 578, n. 7 (35a).

The taxpayers testified that they had made their payments so that they or their children could participate in religious services. (Stip. Rec. II 261-62, 303-04; III 355-56.) They also made their payments because they wanted to support the religious goals and projects of their church. (Stip. Rec. II 261-62, 303; III 355.) None of the taxpayers in the designated cases tried below nor the petitioner here received any material goods or secular services with respect to the payments at issue.[5]

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ple, relationships and responsibilities with respect to one's children or community, in addition to providing the doctrinal basis for fixed donations. (Stip. Rec. II, 297-98).

[5] Beginning in 1978, the Commissioner of Internal Revenue has attempted to disallow deductions for payments made to participate in the religious sacraments of petitioner's church based on three different theories. First, the Commissioner issued a Revenue Ruling that would have disallowed as charitable contributions fixed donations paid by Scientologists to participate in the religious sacrament of auditing on the ground that the donations were for "education" and therefore were comparable to payments for tuition at a private or church school. Rev. Rul. 78-189, 1978-1 C.B. 68. Second, in assessing petitioner for the tax deficiency at issue here, the Commissioner contended that the contributions were not made to an organization eligible to receive deductible contributions. (A5).

Both of these theories have since been abandoned by the Commissioner in his stipulations in this case. As set forth above, the Commissioner has stipulated that the recipient of the donations here is a tax-exempt church eligible to receive deductible contributions and that auditing is a religious service, not an educational endeavor. Now the Commissioner contends that the form of the payment and the nature and the value of the religious service disqualifies petitioner's deductions.

The Commissioner's position in this case is that payments by individuals to participate in the religious sacraments of their church may be disallowed depending on the form of such payment and the nature and value of the religious service provided. The Tax Court agreed and the Fourth Circuit affirmed.

The court of appeals held that payments to a church may not be deducted under § 170 of the Internal Revenue Code when such payments are made to receive religious services. The court concluded that the "structure" of the taxpayer's payments to participate in the religious services of her church "forecloses its characterization as a 'contribution or gift.'" 829 F.2d at 501; *see also Id.* at 503, 504, 505. The panel below regarded the one-on-one religious service provided by petitioner's church to be analogous to "education" or "psychological counseling," although it simultaneously acknowledged that the "government stipulated that auditing was not 'educational'" and also noted that "auditing is 'religious' and not 'educational', and we can be sure that it is not a 'commodity' as that term is ordinarily used." *Id.* at 504 (8-9a). The panel below concluded that the value of the religious benefit received by the petitioner was necessarily equal to the amount of the fixed donation paid to the Church. *Id.* (9-10a). The court foreshadowed the potential impact of its holding on the deductibility of payments to other churches by remarking: "we have no reason to believe that the IRS will fail to apply the principles that emerge from this litigation in its treatment of other religious groups." *Id.* at 505 (11a). The panel below further held that its construction of the statute did not violate petitioner's first amendment rights under the free exercise or establishment clauses and that the IRS had not selectively enforced the statute in violation of the first and fifth amendments.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW IS ONE OF EXCEPTIONAL IMPORTANCE AND CONFLICTS DIRECTLY WITH A DECISION OF THE EIGHTH CIRCUIT

1. The decision of the court below conflicts directly with the decision of the Eighth Circuit in *Staples v. Commissioner*, 821 F.2d 1324 (1987), *petition for cert. filed*, Feb. 19, 1988 (No. 87-1382). Indeed, it is difficult to imagine a squarer conflict since both the decision of the Fourth Circuit below and that of the Eighth Circuit in *Staples* reviewed the same Tax Court opinion and were based on the same record.

The Eighth Circuit held in *Staples* that the taxpayers' payments for religious services were deductible. The court held that under IRS rulings, court opinions and the legislative history of § 170, the receipt of religious services is not the type of "material, financial or economic benefit" for which a deduction may be disallowed. The court observed that benefits from receipt of religious services are considered as a matter of law primarily to benefit the general public and only incidentally to benefit the individual participants. The court stated that:

> Religious observances of any faith are considered under the law of charity to be of spiritual benefit to the general public as well as to members of the individual faith, with the private benefit to the individual participants being merely incidental to the broader good that is served. . . . *The public benefit from religion remains and predominates regardless of whether church doctrines provide for traditional congregational worship or individual worship as in Scientology or whether donations are voluntary or fixed.*
>
> * * * [R]egardless of the timing of the payment or details of the church's methods of soliciting contributions from its members, an amount remitted to a qualified church with no return other than par-

> ticipation in strictly spiritual and doctrinal religious practices is a contribution within the meaning of section 170.

Id. at 1326-1327 (emphasis added).

2. In its petition for certiorari in *Staples*, the government observed that if the "conflicting holdings" among the courts of appeals in these cases are permitted to stand "disparate tax treatment for similarly situated taxpayers" will result. Petition for Certiorari in *Staples* No. 87-1382 at 6-7. The government also commented on the number of individual cases directly at issue: "[t]here are more than 1,000 taxpayers" with cases currently pending and "there are likely to be more in the future." *Id.* at 7. The government also emphasized the important conflicts in the decisions in the courts of appeals on the "validity of the legal proposition" at issue here and in particular, over the applicability to religious services of this Court's holding in *United States v. American Bar Endowment*, 477 U.S. 105 (1986), which denied charitable contribution deductions for payments to purchase life insurance. *Id.* at 7, 8. The government concluded that "resolution by this Court of the conflict in the circuits on the question presented here would be appropriate." *Id.* at 9.

3. In *Hernandez v. Commissioner*, 819 F.2d 1212, a case based on the same Tax Court record as the instant case, the taxpayer, represented by the undersigned, filed his petition for certiorari in this Court on December 11, 1987. No. 87-963. That petition, like the government's petition in *Staples*, observed that the direct conflict among the circuits here, coupled with the exceptional importance of the issues presented, warranted plenary review by this Court.

In addition, the taxpayer's petition in *Hernandez* explained why we believe that the panel of the First Circuit incorrectly resolved the legal issue before it, noting: (1) that the Tax Court's decision improperly reverses

nearly seven decades of consistent IRS practice (Petition for Certiorari in *Hernandez*, No. 87-963 at 12); (2) that the decision grants the IRS a license selectively to disallow individuals' deductions for payments made to their churches solely to participate in the religious services of their faith (*Id.* at 15); (3) that the decision misreads and improperly extends the 1986 decision of this court in *United States v. American Bar Endowment*, 477 U.S. 105, to require IRS valuation of religious services—a task that is both impractical and unconstitutional (*Id.* at 21); and (4) that the denial of charitable contribution deductions under § 170 for auditing by Scientologists violates the religion clauses of the first amendment (*Id.* at 25). Each of these difficulties is also present in the instant case. However, since these issues have been discussed in detail in the *Hernandez* petition, that discussion will not be repeated here.

4. The decision of the court below in this case contains an additional significant misinterpretation of the tax law. The decision of the panel below would reverse dramatically prior IRS and court rulings that the *form* of payment does not warrant disallowance of deductions for religious services or for other charitable contributions. The panel below makes clear the critical nature to it of the form of the transaction by describing its conclusion as "based ultimately on the *structure* the Church has created for such payments." 829 F.2d at 505 (11a) (emphasis added). In fact, the panel below refers to the "structure of the transaction" or the way the transaction is "structured" at least a dozen times. Disallowance of deduction for payments for religious services because of the *form* of the payment finds no support in the Internal Revenue Code and contradicts the fundamental and long-standing principle of tax adjudication that requires the *substance* not the form of a transaction to govern. *See, e.g., United States v. Phellis*, 257 U.S. 156, 168 (1921) (treating the superiority of substance over form as a well-settled principle of tax adjudication).

5. In its petition in *Staples*, the government has indicated that, "if possible," it "would be preferable for this Court to consider the question presented here" in the *Graham* case, and has indicated that it does "not intend to oppose" the taxpayer's petition in that case. Petition for Certiorari in *Staples*, No. 87-1382 at 9. The government asserts that in *Graham*, 822 F.2d 844, a "concrete factual context" exists. *Id.* The basis for the government's preference for the *Graham* case is mysterious. Since the entirety of the record in *Graham* was stipulated to be part of the record in the instant case, as well as to be included in the record in the *Hernandez* and *Staples* cases, there is nothing in the *Graham* record that was not before the courts of appeals in these other cases and nothing that would not be before this Court if it grants review in any of these cases. Moreover, a case and controversy is equally present between the taxpayers and the government in each of these cases and each case raises identical legal issues.

This Court has received petitions for certiorari in *Hernandez* (No. 87-963) and in *Staples* (No. 87-1382). A petition is due in *Graham* on or before March 30, 1988. As indicated above, the government suggested that if the Court grants review, it should do so in *Graham*, while holding the petitions in the other related cases pending disposition of that case. Obviously, there are a variety of alternatives that the Court might pursue in reviewing one or more of these cases. For example, another equally acceptable alternative would be to grant review in each of the related cases and consolidate them for argument; since the taxpayers in each of these cases are all represented by the undersigned, such consolidation would not require any additional time for argument or briefing by the taxpayers or the government. Alternatively, the Court may wish to grant the taxpayer's petition in *Hernandez*, the first case before the Court, and hold the petition in the instant case and other related cases pending disposition of *Hernandez*. With three petitions having been

filed, both by taxpayers and by the government, there seems little reason to delay resolution of these important issues while awaiting the filing of a fourth petition based upon the identical Tax Court record.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of the pending petitions of certiorari in *Hernandez v. Commissioner*, No. 87-963 and *Staples v. Commissioner*, No. 87-1382.

Respectfully submitted,

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March, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 86-2090

ETHEL B. MILLER,
Petitioner-Appellant,

v.

INTERNAL REVENUE SERVICE,
Respondent-Appellee.

TOBIAS C. TOLZMANN; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
Amicus Curiae.

Argued Feb. 4, 1987

Decided Sept. 18, 1987

Before PHILLIPS and WILKINSON, Circuit Judges, and SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

JAMES DICKSON PHILLIPS, Circuit Judge:

Ethel B. Miller, a Virginia resident, appeals a final order of the United States Tax Court, finding a deficiency in income tax due in the amount of $256 for the taxable year 1982. Miller's deficiency followed when the Internal Revenue Service (IRS) disallowed her claimed "charitable contribution" in the amount of $3,638.18 to the Church of Scientology (Church).

This appeal is one of many. Miller, along with perhaps 1000 other taxpayers, has claimed deductions for payments to the Church for "auditing" or "pastoral counselling"—a form of one-to-one counselling or training which is the central "religious" exercise of the Church. The IRS initially challenged the deductions in Rev. Rul. 78-189, 1978-1 C.B. 68, concluding that such payments, like tuition fees paid to private or church schools, were not deductible unless the taxpayers could establish that their payments exceeded the value of benefits and privileges received in return.

Miller and others challenged the IRS position and stipulated, along with IRS, that they would be bound by "relevant findings of fact and conclusions of law" from a Tax Court test case in the Ninth Circuit. They also agreed that the stipulation would not affect the venue of any appeal and "that to the extent relevant the records in said [test case] shall be deemed part of the record . . . for purposes of any . . . appeal." The Tax Court decided adversely to the Ninth Circuit taxpayers in *Graham v. Commissioner*, 83 T.C. 575 (1984), a decision which incorporated the record from another case, *Church of Scientology of California v. Commissioner*, 83 T.C. 381 (1984). Once the IRS prevailed against Miller in the Tax Court on its Motion for Entry of Final Decision based on the stipulation, she appealed to this court. Other Church members have initiated identical appeals, based on the same "Stipulated Record on Appeal," in every circuit except the Federal Circuit. To date, three circuits have addressed these parallel appeals. *See Graham v. Commissioner*, 822 F.2d 844 (9th Cir. July 17, 1987); *Staples v. Commissioner*, 821 F.2d 1324 (8th Cir.1987); *Hernandez v. Commissioner*, 819 F.2d 1212 (1st Cir.1987). With this opinion, we join the Ninth and First Circuits in rejecting the contention that payments for auditing constitute "charitable contributions" and that any contrary interpretation violates the first amendment.

I

In *Graham*, the taxpayers and the IRS agreed to a series of stipulations (limited to this litigation) which narrowly focussed the legal issue presented to the Tax Court. Most pertinently, the parties agreed that Scientology is a "religion" and that the Scientology organizations to which the taxpayers made their contested payments were "churches" within the meaning of 26 U.S.C. § 170(b)(1)(A)(i), "corporations" described in 26 U.S.C. § 170(c)(2), and exempt from general taxations as institutions "organized and operated exclusively for religious . . . purposes." 26 U.S.C. § 501(c)(3). The IRS also conceded that "auditing," for which the taxpayers made the challenged payments, is not "instructional or educational" but a form of religious observance in which "no subject matter is taught, studied or learned," and that the Church does not actively solicit contributions from its members or the public but supports its operations principally through "fixed donations" paid by its members for auditing sessions. These stipulations required the Tax Court to focus initially on a single legal question: were the taxpayers' payments contributions or gifts as described in 26 U.S.C. § 170? If they were, then the taxpayers were entitled to their deductions.[1]

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[1] In *Church of Scientology v. Commissioner*, 83 TC 381 (1984), the government argued successfully that the Church of Scientology of California was not operated exclusively for religious purposes under § 501(c)(3). This ruling could have provided an independent basis for denying the taxpayers' deductions in *Graham*. *See* § 170(c)(2)(B). The government, however, elected to challenge the deductions solely on the ground that they did not constitute a "contribution or gift," and we of course accept the consequences of the government's stipulations. The Ninth Circuit has recently affirmed the tax court's decision denying the Church's tax-exempt status in *Church of Scientology v. Commissioner*, 823 F.2d 1310 (9th Cir. 1987).

The Tax Court, however, decided that the *structure* of an auditing payment forecloses its characterization as a "contribution or gift." Auditing offers Church members one-to-one sessions in which members participate in the central religious observance of Scientology. Auditing is only available to members who first pay a "fixed donation" according to a published schedule of charges. This "fixed donation" is never waived. The Tax Court concluded that since the Church member must pay the fixed donation in order to receive auditing services, the member's payment is not a "contribution or gift" but rather a payment made with the expectation of a substantial return benefit.

The Tax Court's analysis touches on a particularly confused issue of federal taxation. While Congress has permitted taxpayers to deduct contributions to designated non-profit organizations since 1917, successive amendments to the Internal Revenue Code (Code) have never defined the term "contribution or gift." In its present form, the Code establishes the deductibility of "any charitable contribution" in § 170(a)(1), then cryptically explains in § 170(c) that "the term 'charitable contribution' means a contribution or gift to or for the use of [designated non-profit organizations]."

Despite the importance to the Code of the abstract phrase "contribution or gift," neither Congress nor the courts have offered any very satisfactory definition.[2] The limited discussion of the phrase in legal literature has focussed on the question whether, for purposes of § 170, the phrase invites an investigation into the subjective intent or motive of the transferor, an objective assessment of the difference in value of the transferred property and any return benefits to the transferor, or some

[2] The courts have long accepted the notion that "gift" and "contribution" are synonomous. *See DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962)); *Channing v. United States*, 4 F.Supp. 33 (D.Mass. 1934).

combination of the two. *See* Hobbet, *Charitable Contributions—How Charitable Must They Be?*, 11 Seton Hall L.Rev. 1 (1980). This doctrinal dispute traces its roots to the Supreme Court's definition of "gift" for purposes of § 102 of the Code in terms of "detached and disinterested generosity." *Commissioner v. Duberstein*, 363 U.S. 278, 286, 80 S.Ct. 1190, 1197, 4 L.Ed.2d 1218 (1960). Courts have since struggled to decide whether this definition solely in terms of donative intent should also apply to § 170, and, if not, whether and how the courts should respect the common law requirement that an *inter vivos* "gift" also be made without consideration in return for the "gift." *See* Collition, *The Meaning of "Contribution or Gift" for Charitable Contribution Deduction Purposes*, 41 Ohio St.L.J. 973, 974-79. Many courts, then, have simply transposed the *Duberstein* test into the § 170 setting. *See, e.g. example, DeJong v. Commissioner*, 309 F.2d 373 (9th Cir.1962). Others have rejected the "detached and disinterested generosity" test in favor of a more objective test focussing on any return benefit to the transferor. *See, e.g., Oppewal v. United States*, 468 F.2d 1000, 1002 (1st Cir.1972) ("The more fundamental objective test is—however the payment was designated, and whatever motives the taxpayer had in making it, was it, to any substantial extent, offset by the cost of services rendered to taxpayers in the nature of tuition?"); *Singer Co. v. United States*, 449 F.2d 413, 423 (Ct.Cl.1971) ("It is our opinion that if the benefits received, or expected to be received, are substantial, and meaning by that, benefits greater than those that inure to the general public from transfers for charitable purposes (which benefits are merely *incidental* to the transfer), then in such case we feel the transferor has received, or expects to receive, a *quid pro quo* sufficient to remove the transfer from the realm of deductibility under section 170.") (emphasis in original).

This dispute over how best to determine whether a payment is a "contribution or gift" for purposes of § 170

illustrates the difficulty of defining this key abstract concept in the Code. We do not believe, however, that this appeal requires us to choose among the alternative approaches since Miller's payment does not qualify under any of the available tests: her payment was not made with "detached and disinterested generosity," but rather in the expectation that she would receive a valuable service from the Church in return for her payment.

Our conclusion is reinforced by the Ninth Circuit's analysis of the direct appeal from *Graham*. The Ninth Circuit since *DeJong* has endorsed the *Duberstein* test for § 170. As the Ninth Circuit noted, however:

> The test of detached and disinterested motive is designed to determine that no measurable, specific return comes to the payor as a quid pro quo for the donation. This focus on the external features of the transaction serves as an expedient for any more intrusive inquiry into the motives of the payor.

At 848. In other words, the subjective and objective tests for a charitable "gift," both derived indirectly from the common law, coalesce; the structure of the transaction evidences the motives of the transferor. Even if the ultimate question is one of donative intent, "[i]f a transaction is structured in the form of a quid pro quo, where it is understood that the taxpayer's money will not pass to the charitable organization unless the taxpayer receives a specific benefit in return, and where the taxpayer cannot receive the benefit unless he pays the required price, then the transaction does not qualify for the deduction under section 170." *Id.* at 849. *See also Hernandez*, 819 F.2d at 1216 (disallowing deductions to the Church where the payments were "made with the expectation of receiving a commensurate return benefit"); *United States v. American Bar Endowment*, 477 U.S. 105, 106 S.Ct. 2426, 2434, 91 L.Ed.2d 89 (1986) ("The *sine qua non* of a charitable contribution is a

transfer of money or property without adequate consideration.").

The transactions at issue in this appeal were unequivocally structured as payments made with the expectation of a commensurate return benefit. The Church advertised its auditing sessions, published price lists, and refused to provide the sessions without payment. The Church recognized the member's contractual right to receive the service and refunded payments if the sessions were not performed. These and other "commercial" aspects to the marketing of auditing sessions which were noted by the Tax Court in *Graham* do not, as Miller argues, necessarily clash with the government's stipulation that Scientology is a "religion." They do, however, reveal that auditing is a service whose value to the recipient is fixed in a definite schedule of prices. Since the Church member does not receive the service unless she pays the scheduled fee, the service, however labelled or analogized, is a quid pro quo for the payment and the payment is not "charitable."

On appeal, Miller does not argue that her motives varied from those of the taxpayers in *Graham*, and she does not challenge the use of a "structural" test to define "contribution or gift." Instead, she argues that the Tax Court in *Graham* erred as a matter of law in assuming that there can be a recognizable return benefit or quid pro quo when the taxpayer makes payments in return for purely "religious" as opposed to "economic" benefits. According to Miller, *any* payment to a church for "religious" services must qualify as a charitable deduction regardless of the structure of the transaction, and, apparently, without any inquiry into the taxpayer's motivations for making the payment.

The Eighth Circuit accepted this argument in *Staples*, concluding that "participation in strictly religious practices is not a recognizable return benefit under section

170." 821 F.2d at 1328. The court noted the government's stipulation that auditing is a "religious" practice. The court then agreed with the taxpayers that religious services are "not commodities that are purchased in commercial transactions," *id.* at 1327, and that the purposes of the charitable deduction are best served by automatically allowing a deduction for such religious services, *id.* at 1326-27. The court concluded that only a demonstration by the government of an "economic," as opposed to "religious," quid pro quo should lead to denial of a claimed charitable deduction. *Id.* at 1327.

There is undoubtedly an appealing quality to the Eighth Circuit's *Staples* analysis. Its near bright-line test seemingly avoids many of the conceptual problems forced by tests that require more detailed inquiries into motivation, structure, and the relationship between the *quid* and *quo* of particular transactions. It faces up honestly to the interpretive problems that abound in this murky realm of tax law jurisprudence. In the end, it concludes that the inquiry is essentially over once the "religious" nature of services for which payment is made are either proven or conceded. Nevertheless, we respectfully disagree with some of its critical points and with its end result.

Initially, we think that the importance of the government's stipulations should not be exaggerated and may have been in *Staples*. The government stipulated that auditing was not "educational" and thereby lost its opportunity to argue that the case was controlled by past court decisions denying deductions for tuition payments to church schools. This does not, however, foreclose the courts from considering analogies to other services which provide intangible benefits to taxpayers. As *Staples* itself concedes, the IRS and the courts have recognized that "economic" value can be assigned to intangible return benefits that are difficult to translate into monetary value, and that such intangible benefits can represent a quid pro

quo that precludes characterization of the payments necessary to secure such benefits as "charitable." *Id.* at 1327. *See Hernandez*, 819 F.2d at 1217. We must assume along with the Tax Court that auditing is "religious," and not "educational," and we can be sure that it is not a "commodity" as that term is ordinarily used. It is, however, a service which, *like* education or psychological counselling or the like, is sold to a recipient who ostensibly benefits from it and measures its value by the size of her payment.

We also see no justification in either the language of § 170 or the case law explicating it for drawing a distinction between "religious" and other services that produce intangible benefits. It is true that much of the case law, including *American Bar Endowment*, has concerned charitable deductions claimed for goods or services which are priced in a competitive market. In such a market, the "economic" benefit can be measured by the competitive price. *Staples* accepted the taxpayer's assertion that auditing, because it is, by stipulation, "religious" and not offered in a "competitive market," produces only a "religious" and not an "economic" benefit. This argument is plausible on the surface, but we believe it is flawed in two fundamental ways. First, neither statute nor case law embody any fundamental distinction between "religious" and "economic" benefits, *Hernandez*, 819 F.2d at 1217-18, or between the tax treatment available to contributors to churches and contributors to other non-profit organizations, *id.* at 1220. *See also Graham*, at 849-50. Second, the taxpayer cannot plausibly argue that there is no "economic" benefit—i.e., no intangible benefit from the service which can be assigned a dollar value—when the Church itself assigns such value in its schedule of fees. Moreover, the taxpayer does not claim that the fee exceeds the cost of providing the service. It may be true that "[s]piritual gain to an individual church member cannot be valued by any measure known in the secular realm," *Staples*, 821 F.2d at 1327, but the value which

the taxpayer *expects* to receive, whether religious or secular, can be measured when she must pay a fixed fee in order to receive it. In other words, we believe that in the peculiar circumstances before us it is the *structure* of the Church's fixed donation plan, and not any post hoc characterization of the service rendered, that should determine whether the taxpayer is paying for a service of value to her or making a "charitable contribution."

Finally, we think that the structure of the fixed donation plan undermines *Staples*'s conclusion that the general purposes of § 170 are best served by categorically refusing to recognize return benefits flowing from any services established as "religious." According to *Staples*, this distinction between "religious" and other benefits is premised on the notion that "[r]eligious observances of any faith are considered under the law of charity to be of spiritual benefit to the general public as well as to members of the faith, with the private benefit to individual participants being merely incidental to the broader good that is served." *Id.* at 1326. The distinction between "incidental" and "direct" benefits to the taxpayer may be important in testing the "charitable character" of a payment. As a general proposition, an otherwise qualifying charitable deduction will be denied only when the return benefit the taxpayer receives is *commensurate* with the value he transfers. *See, e.g., Sedam v. United States*, 518 F.2d 242, 245 (7th Cir. 1975). A church member's payments to her church, or a taxpayer's payments to other non-profit organizations, may be ordinarily deductible under such a regime because the benefits she receives are "incidental" to the benefits which flow to other members of her church or to the general public. The structure of the auditing sessions here in issue, however, insures that their benefits inures primarily to members who pay the fixed fee; the Church's literature emphasizes that the benefits of auditing are "personal," and the fixed donation plan and the Church's refusal to waive the fee insure that such benefits reach only those who pay for them. The

policy arguments urged in *Staples*, then, fail to recognize that even payments to a church for "religious services" can be structured as here so that their benefit is a quid pro quo—a direct and commensurate benefit—which the member is purchasing. Such payments simply are not "gifts," either in legal or practical contemplation, and we so hold in agreement with the Tax Court.

II

In addition to attacking the Tax Court's interpretation of the phrase "contribution or gift" in § 170, Miller argues that such an interpretation, even if countenanced by the Code, offends the first amendment. Not surprisingly, she can construct a colorable, if convoluted, argument that the disallowance of a charitable deduction for payments by a church member to her Church, based ultimately on the structure the Church has created for such payments, at least implicates free exercise and establishment clause concerns and suggests discriminatory enforcement of the principles of § 170 by the IRS. While these arguments, because of their complexity, deserve thoughtful consideration, we agree with the First and Ninth Circuits that they are ultimately unavailing.

We turn first to Miller's claim that the government has selectively enforced the principles of § 170 against the Church. This argument is part and parcel of Miller's general first amendment claim that § 170, as we have described its principles, "discriminates" against the Church and its adherents because they are less advantaged than they would be under a rule of their own choosing. While Miller and her Church might benefit from a different rule, however, we see no reason to depart from the Tax Court's finding of fact that the IRS did not selectively enforce § 170 against them. We need hardly add that Congress, not the IRS, created § 170, and we have no reason to believe that the IRS will fail to apply the principles that emerge from this litigation in its treatment of other religious groups.

The neutral principles underlying our definition of "charitable contribution" in § 170 also undermine Miller's Establishment Clause claims. This is not a statute which on its face makes "explicit and deliberate distinctions between different reiigious organizations." *Larson v. Valente*, 456 U.S. 228, 247 n.23, 102 S.Ct. 1673, 1684 n.23, 72 L.Ed.2d 33 (1982). Moreover, even if the statute exerts a disparate impact on the Church, "such an impact would not invalidate a neutral interpretation of a law whose purpose or primary effect is neither approval nor disapproval of any religious denomination." *Hernandez*, 819 F.2d at 1219. As the First Circuit aptly noted, the taxpayers' proposed interpertation of § 170, which would treat their payments for religious services preferentially, would offend the Establishment Clause in a much more obvious fashion than would the interpretation we endorse. *Id.* at 1220-21.

Miller's free exercise claim is the most complicated of her constitutional arguments in large part because the alleged inhibition of her free exercise of Scientology occurs indirectly and ambiguously. Miller's free exercise argument has two principle components. First, she argues that to deny her and other Church members a deduction for their "fixed donations" would be to restrict the activities of the Church and pressure it to abandon a payment system that is doctrinally required. Second, she argues that to deny her deduction would be to condition her receipt of a government benefit on surrender of a belief at the center of her faith. Both of these arguments are premised on the Church's "Doctrine of Exchange," which she argues *requires* her to pay for any valuable service, such as auditing, which she receives.

As the First and Ninth Circuits have observed, this argument is rife with difficulties. Her arguments premised on the likely effect on the Church of disallowing the claimed deduction ignore her lack of standing to assert such a hypothetical injury to a third party, *Hern-*

andez, 819 F.2d at 1224, as well as the general principle that a statute is not invalid merely because it affects the operations of a religious organization, *Graham*, at 851. Her arguments premised on the supposed impact of disallowing the deduction on her exercise of the Doctrine of Exchange are doubtful on both factual and logical grounds. The record does not convince us that the Church's fixed donation plan is mandated by the "Doctrine of Exchange," or that the Church would refuse, or forbid its members from offering, a true "gift." Even if the record supported such propositions, we do not understand how a religious belief that all benefits must be paid for by the recipient can be used to attack Congress's refusal to "give" a tax benefit to the believer. *See Hernandez*, 819 F.2d at 1222. We are simply not convinced as a factual matter that any supposed burden on Miller *or* the Church is "substantial," or that the alleged burden on Miller from any restriction of the § 170 deduction to a "contribution or gift" as we have explained that phrase interferes with her exercise of a tenet or belief central to the religious doctrine of the Church. *See Thomas v. Review Board*, 450 U.S. 707, 717-18, 101 S.Ct. 1425, 1431-32, 67. L.Ed.2d 624 (1981).

As both the First and Ninth Circuits have observed, even if church members could demonstrate a recognizable burden on the free exercise of their religious beliefs, such a burden would be justified in this setting by the government's compelling need to preserve the integrity of the taxation system. *Hernandez*, 819 F.2d at 1225; *Graham*, at 852-53. Section 170 embodies a neutral principle which distinguishes between the consequences of payments to non-profit organizations which are "charitable" and those which are made in expectation of a quid pro quo. Any special treatment for Miller, whether through a special exemption or a strained judicial interpretation of "contribution or gift," would threaten Establishment Clause values and invite demands from other religious groups to receive similar special treatment. It would also thrust

the IRS and the courts into the constitutionally sensitive business of distinguishing between "religious" and "non-religious" services. We agree with the Ninth Circuit that "the soundness of the tax system depends on government's ability to apply the tax law in a uniform and even-handed fashion, and the exemption of one presages the exemption of a great many others. The administrative difficulties in enforcing such a scheme, and the danger of manipulation, are manifest," *Graham*, At 853.

The decision of the Tax Court is affirmed.

AFFIRMED.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2090

ETHEL B. MILLER,
Petitioner-Appellant

v.

INTERNAL REVENUE SERVICE,
Respondent-Appellee

TOBIAS C. TOLEMAN, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
Amicus Curiae

[Filed Sept. 18, 1987]

Appeal from the Tax Court of the United States

THIS CAUSE came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and by adjudged this Court that the decision of said The [sic] Tax Court of the United States, in this cause, be, and the same is hereby, Affirmed.

/s/ John M. Greacen
Clerk

Petition For Rehearing Filed 10/9/87

APPENDIX C

CORRECTED ORDER

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2090

ETHEL B. MILLER,
Appellant,

versus

INTERNAL REVENUE SERVICE,
Appellee,

TOBIAS C. TOLZMAN, *et al*,
Amicus Curiae.

[Filed Nov. 9, 1987]

On Petition for Rehearing with Suggestion for Rehearing In Banc

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ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Wilkinson and Judge Spencer, United States District Judge, sitting by designation.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX D

UNITED STATES TAX COURT

Docket No. 5837-76

KATHERINE JEAN GRAHAM,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

[Filed Dec. 6, 1982]

STIPULATION #1

In accordance with Tax Court Rule 91, the parties hereby stipulate the matters hereinafter stated, subject to the rights of the parties to introduce other and further evidence not inconsistent herewith and reserving to each of the parties the right to object to the materiality or relevance hereof in whole or in part.

1. Petitioner maintained her legal residence at 743 Pumehana, Hawaii, at the time of the filing of the petition herein.

2. Petitioner filed a timely Federal Income Tax return for the taxable year ending December 31, 1972, a true and correct copy of which is attached hereto and marked as Joint Exhibit 1-A.

3. Petitioner's income tax return for said taxable year was examined by respondent, who, on April 7, 1976, is-

sued a notice of deficiency, a true and correct copy of which is attached hereto and marked as Joint Exhibit 2-B.

4. Petitioner claimed a charitable contribution deduction under I.R.C. § 170 for $2,379.50 transferred to the Church of Scientology of Hawaii and to the Scientology and Dianetic Center of Hawaii.

5. Each of Exhibits C through Q is a document received by petitioner from the Church of Scientology of Hawaii or from the Scientology and Dianetics Center for Hawaii, reflecting transactions of petitioner with one or the other of them.

6. During November of 1972, petitioner paid $200.00 to the Church of Scientology of Hawaii for Auditing, which payment is not reflected on respondent's Exhibits C through Q.

7. The neologisms "Scientology" and "Dianetics" were introduced by L. Ron Hubbard. Mr. Hubbard wrote *Dianetics: The Modern Science of Mental Health*, which was published in 1950 and which sets forth the general principles of Dianetics and Dianetic Auditing as discovered and developed to 1950.

8. Some of the beliefs and practices of Scientology are roughly described in lay terms in *Scientology, A World Religion Emerges in the Space Age*, a book copyrighted by L. Ron Hubbard. Respondent's Exhibit R attached hereto is a true copy of said book. Petitioner objects to said exhibit on grounds of relevance, hearsay and the first amendment.

9. The Church of Scientology of Hawaii is, and is considered by the Churches of Scientology to be, a church of the kind referred to by Scientologists as a "Class IV Church" or "Class IV Org." The Scientology and Dianetics Center of Hawaii is, and is considered by Churches

of Scientology to be, a church of the kind referred to by Scientologists as a "Mission."

10. There are many churches and missions in the United States and in other countries which practice, teach and promulgate Scientology. As used herein, "Churches of Scientology" refers collectively to such churches and missions, and "Scientologist" refers to members of such churches and missions.

11. The Churches of Scientology, including the Church of Scientology of Hawaii and the Scientology and Dianetics Center of Hawaii, follow common doctrines, practices and beliefs of Scientology.

12. The Churches of Scientology offer Auditing and courses to Scientologists.

13. Auditing, also variously referred to as "processing," "counselling" and "pastorial counselling," is conducted by a specially trained Scientologist, referred to as an "Auditor."

14. Auditing is generally conducted in a private session one to one, between the Auditor and the person being Audited.

15. Every Auditing session is structured and conducted in exact accordance with rituals, codes, doctrines and tenets of Scientology.

16. Scientologists are taught that the individual is an immortal spirit who has a mind and a body. Scientologists are also taught that the highest level of spiritual ability and awareness can be attained only by progressing on a step by step basis through lower and intermediate levels of Auditing.

17. The structure, ritual and content of each Auditing session are determined by the level of attainment of the Scientologist being Audited.

18. Some of the rituals used in Auditing include questions, commands and drills.

19. The Auditor acknowledges the response of the person being Audited, but offers no analysis of the response to the person being Audited.

20. An E-Meter is a device used in Auditing.

21. Auditing is delivered in sessions. An "Intensive" is a specific number of hours of Auditing intended to be given over a short period of time. An intensive is 12½ or 25 hours of Auditing and usually involves 12½ hours of Auditing.

22. An Auditor who conducts a session is expected to know and understand the rituals, codes, tenets and doctrines of Scientology applicable to the conduct of Auditing generally and to have mastered the particular material to be used in the session.

23. No subject matter is taught, studied or learned during an Auditing session (except that the Scientologist being Audited necessarily learns and understands the particular practice used in the session).

24. The Churches of Scientology offer courses to provide training in the doctrines, tenets, codes, policies and practices of Scientology and to train Scientologists as Auditors.

25. Training is delivered to Scientologists under the supervision of a trained Scientologist. Training is delivered in courses each of which includes specific material to be mastered by the students in order to complete the course. Courses range from basic courses which introduce the doctrines and tenets of Scientology through courses which train and qualify Auditors to deliver Auditing at the highest levels.

26. It is a doctrine of Scientology, and Scientologists are taught, that spiritual gains result from the study and understanding of the doctrines, codes and tenets of Scientology, whether or not the student receives Auditing.

27. Scientologists believe that they can attain benefits from Auditing, but only on degrees or steps. These include levels called "Grades" and higher levels called "OT Sections."

28. Respondent's Exhibit S attached hereto is a copy of a document headed "THE BRIDGE" which was published by the Church of Scientology of California. Petitioner objects to said exhibit on grounds of relevance, hearsay and the first amendment.

29. In contrast to Auditing, Auditor training and other courses furnished by the Churches of Scientology are instructional or educational; the student is expected to understand and learn the material which is the subject matter of the particular course he or she takes. As used herein, "course" means and refers to such services and not to Auditing. Some courses including Auditing by students and Auditing of students.

30. The Churches of Scientology deliver Auditing and training at various levels. A Scientologist who receives Auditing begins at the lowest level and progresses step by step to higher and higher levels. A Scientologist who receives training also begins at the lowest level and progresses step by step to higher and higher levels. Only Auditors who have been qualified by training at an appropriate level can deliver Auditing at that level.

31. Some of the Churches of Scientology also deliver administrator and executive training courses. The students in such courses are taught the management methods and policies of the Churches of Scientology, and are mostly staff members of the Churches of Scientology.

Such courses are occasionally taken by Scientologists who are not staff members. The subject matter of such courses includes Scientology doctrines, tenets and codes which are applicable to the administration and management of Scientology organizations.

32. The Churches of Scientology also deliver a few short courses of a general educational nature, designed to remedy educational deficiencies and to teach Scientology study methods, to enable the student to progress more rapidly in Scientology courses.

33. All of the courses offered by the Churches of Scientology are founded upon the doctrines and tenets of Scientology, in the manner of presenting the material studied and in the instructional methods.

34. The Scientology and Dianetic Center of Hawaii offers Auditing at Grades I through IV.

35. The Church of Scientology of Hawaii offer Auditing from Grade I through Grade IV and Auditor training from Class I through Class IV.

36. The Churches of Scientology have established charges for Auditing and for courses they deliver, and refer to payments of such charges as "fixed donations" or "fixed contributions." Such payments are hereinafter referred to as "fixed donations."

37. Fixed donations are sometimes made for an Intensive 12½ or 25 hours of Auditing.

38. Respondent's Exhibit T attached hereto is a copy of a schedule of fixed donations and book order form, copyrighted by L. Ron Hubbard and published by the Church of Scientology of California. Petitioner objects to said exhibit on grounds of relevance, hearsay and the first amendment.

39. Fixed donations constitute the source of most of the funds of the Churches of Scientology. Their only

other source of funds is from sales of Scientology literature, tapes of lectures by L. Ron Hubbard (the founder of Scientology) and artifacts.

40. The payments made by petitioner were fixed donations.

41. The Churches of Scientology do not actively solicit contributions from their members or from the public, other than fixed donations.

42. Petitioner first became a Scientologist in 1971 when she attended activities of the Scientology and Dianetics Center of Hawaii.

43. The Hubbard Qualified Scientologist Course (HQS) is an introductory course, one purpose of which is to familiarize the student with certain basic techniques used in Auditing.

44. Respondent's Exhibit U attached hereto is a copy of a pamphlet copyrighted by L. Ron Hubbard and published by the Church of Scientology of California. Petitioner objects to said exhibit on grounds of relevance, hearsay and the first amendment.

45. The Communications Course is an introductory course one purpose of which is to introduce those unfamiliar with Scientology to certain concepts of Scientology.

46. Respondent's Exhibit V attached hereto is a copy of a pamphlet copyrighted by L. Ron Hubbard and published by the Church of Scientology of California. Petitioner objects to said exhibit on grounds of relevance, hearsay and the first amendment.

47. The Communications Course referred to in respondent's Exhibit H was attended by petitioner's daughter, Karen.

48. The Communications Course referred to in respondent's Exhibit I was attended by petitioner's daughter, Laurel.

49. The Hubbard Qualified Scientologist Course referred to in respondent's Exhibit J was attended by petitioner's daughter, Karen.

50. The Hubbard Qualified Scientologist Course referred to in respondent's Exhibit K was attended by petitioner's daughter, Laurel.

51. Respondent's Exhibits W through AQ attached hereto are copies of documents, each of which was published and/or copyrighted as follows:

W Two page flyer, first page headed "Knowledge Services—Books," published by ASHO (Church of Scientology of California) and copyrighted by L. Ron Hubbard.

X Booklet entitled "Scientology & Dianetics," published by Church of Scientology of California.

Y Magazine, the cover of which is missing, published by the Founding Church of Scientology of Washington, D.C. and commencing with an article entitled "The Dangerous Environment."

Z Booklet entitled "Church of Scientology Information, Definitions, Rules," copyrighted by L. Ron Hubbard.

AA Flyer entitled "Gain Respect for Self and Others Through Scientology Training," published by the Los Angeles Organization (Church of Scientology of California) and copyright by L. Ron Hubbard.

AB Flyer entitled "Your Road to Total Freedom," published by Church of Scientology of California and copyrighted by L. Ron Hubbard.

AC Flyer commencing with excerpts titled "On Exchange," published by the San Francisco Organization (Church of Scientology of California) and copyright by L. Ron Hubbard.

AD Flyer entitled "Scientology Auditing gives you a chance to handle your environment better," published by The Church of Scientology Foundation (Church of Scientology of California) and copyright by L. Ron Hubbard.

AE Booklet entitled "Your Road to Clear Goes Through ASHO Foundation," published by Church of Scientology of California and copyrighted by L. Ron Hubbard.

AF Magazine entitled "Advance," Issue 18, published by the Advanced Organization (Church of Scientology of California) and copyright by L. Ron Hubbard.

AG Magazine entitled "Advance," Issue 19, published by the Advanced Organization (Church of Scientology of California) and copyright by L. Ron Hubbard.

AH Magazine entitled "Gateway," Issue 61, published by the Church of Scientology in San Francisco (Church of Scientology of California) and copyright by L. Ron Hubbard and copyright by L. Ron Hubbard.

AI Magazine entitled "Gateway," Issue 73, published by the Church of Scientology in San Francisco (Church of Scientology of California).

AJ Magazine entitled "THE AUDITOR: The Monthly Journal of Scientology," Issue 92 Worldwide, published by New American Saint Hill Organization (Church of Scientology of California) and copyright by L. Ron Hubbard and copyright by L. Ron Hubbard.

AK Magazine entitled "THE AUDITOR: The Monthly Journal of Scientology," Issue 91 Worldwide, published by New American Saint

Hill Organization (Church of Scientology of California).

AL Magazine entitled "Cause," Issue 26, published by ASHO Foundation (Church of Scientology of California) and copyright by L. Ron Hubbard.

AM Magazine entitled "Cause," Issue 26, published by ASHO Foundation (Church of Scientology of California) and copyright by L. Ron Hubbard.

AN Magazine entitled "Clear News," Issue 107, published by AOLA (Advanced Organization, Los Angeles—Church of Scientology of California) and copyright by L. Ron Hubbard.

AO Magazine entitled "Clear News," Issue 104, published by AOLA (Advanced Organization, Los Angeles—Church of Scientology of California) and copyright by L. Ron Hubbard.

AP Magazine entitled "Realty," Major Issue 96, published by Church of Scientology of California and copyright by L. Ron Hubbard.

AQ Magazine entitled "Realty," Issue 102, published by Church of Scientology of California.

Petitioner objects to each of said exhibits on grounds of relevance, hearsay and the first amendment.

52. Respondent has not contested and will not contest, but only for the purposes of this litigation, petitioner's contention that Scientology was at all relevant times a religion.

53. Respondent has not contested and will not contest, but only for the purposes of this litigation, petitioner's contention that each Scientology organization to which petitioner paid money was at all relevant times a church within the meaning of I.R.C. § 170(b)(1)(A)(i), a corporation described in I.R.C. § 170(c)(2) and exempt

from general income taxation under I.R.C. § 501(a) as an organization described I.R.C. § 501(c)(3).

KENNETH W. GIDEON
Chief Counsel
Internal Revenue Service

By: /s/ Paul G. Wilson
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Date: 8/20/82

/s/ C. Cobb
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Date: 17 August 82

APPENDIX E

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 22364-85

ETHEL B. MILLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER AND DECISION

After due consideration of petitioner's Motion for Entry of Final Decision filed December 2, 1985, respondent's Notice of Objection filed December 23, 1985, petitioner's Response to Notice of Objection filed January 7, 1986, and the parties' Stipulation filed in response to the Court's February 12, 1986 Order, it is

ORDERED that petitioner's above-referenced Motion for Entry of Final Decision is granted. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from petitioner in the amount of $256.00 for the taxable year 1982.

/s/ Samuel B. Sterrett
SAMUEL B. STERRETT
Chief Judge

Entered: Apr. 25, 1986

APPENDIX F

UNITED STATES TAX COURT

Docket No. 22364-85

ETHEL B. MILLER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION

It is hereby stipulated by and between Petitioner(s) and Respondent, by their respective counsel of record, that they will be bound herein by any relevant findings of fact and conclusions of law made by the Court in its opinions and decisions in three certain related "test" cases, namely, Docket Nos. 5837-76, 9384-79, and 374-80, to the extent that such findings of fact and conclusions of law shall have been actually briefed, argued and submitted in such "test" cases, and have been based upon stipulations and/or otherwise undisputed facts therein, excluding, however, findings of fact and conclusions of law relating to any petitioner's subjective intent.

It is understood and agreed that nothing in this stipulation, or in any order based hereon, shall in any way be construed as waiving or changing the venue of any appeal from decision herein, as provided in IRC § 7482 (b)(1)(a); and that to the extent relevant the records in said Docket Nos. 5837-76, 9384-79 and 374-80 shall be

deemed part of the record herein for purposes of any such appeal.

FRED T. GOLDBERG, JR.
Internal Revenue Service

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Dated: February 7, 1986

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Dated: February 25, 1986

APPENDIX G

UNITED STATES TAX COURT

Docket Nos. 5837-76, 9384-79, 374-80

Filed October 15, 1984

KATHERINE JEAN GRAHAM, *et al.*,[1]
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Held: The payments made by petitioners to the various churches of Scientology were not charitable contributions within the meaning of sec. 170(c), I.R.C. 1954. The remittances were made with the exception of receiving a benefit, and such benefit was received. Thus, the transfers were in reality a quid pro quo. *Held, further*, denial of the claimed deductions did not violate any of petitioners' constitutional rights.

Robert N. Harris, Christopher Cobb, and *John E. Taussig*, for the petitioners.

James M. Kamman and *Charles Rumph*, for the respondent.

STERRETT, *Judge*: In these consolidated cases, respondent determined deficiencies in petitioners' Federal income taxes as follows:

Docket No.	*Petitioner*	*TYE Dec. 31—*	*deficiency*	*Date of Deficiency notice*
5837-76	Katherine Jean Graham [2]	1972	$316.24	Apr. 7, 1976
9384-79	Richard M. Hermann	1975	803.00	Apr. 4, 1979
374-80	David Forbes Maynard	1977	643.00	Nov. 14, 1979

[1] Cases of the following petitioners are consolidated herewith: Richard M. Hermann, docket No. 9384-79; David Forbes Maynard, docket No. 374-80.

[2] Petitioner Graham was unmarried during the tax year in question. Subsequently, she married, and her married name is Mrs. Elliott.

The issues before the Court are: (1) Whether payments made by petitioners to the various churches of Scientology [3] were deductible charitable contributions, and (2) whether denial of the claimed deductions would violate petitioners' constitutional rights.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulations of fact, together with the exhibits attached thereto, are incorporated herein by this reference. The parties specifically stipulated to the entire record in *Church of Scientology of California v. Commissioner*, 83 T.C. 381 (1984). All relevant findings of fact and court rulings from that case will be incorporated into this opinion. Since neither party argued to the contrary, it will be assumed that the Church of Scientology continued to operate at all relevant times in the same manner as it did in *Church of Scientology of California v. Commissioner, supra.*

For purposes of this litigation only, respondent did not contest petitioners' contentions that: (1) Scientology was at all relevant times a religion; (2) each Scientology organization to which petitioners paid money was at all relevant times a church within the meaning of section 170(b)(1)(A)(i),[4] and (3) Scientology was at all relevant times a corporation described in section 170(c)(2) and exempt from general taxation under section 501(a) as an organization described in section 501(c)(3).

Petitioners' residences at the time they filed their respective petitions in this case, and the places they filed

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[3] For convenience, these various churches of Scientology will be referred to as either the Church of Scientology or the Church.

[4] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954 as amended and in effect during the taxable years in issue.

their timely income tax returns for their respective years are as follows:

Petitioner	*Residence*	*TYE Dec. 31—*	*Appropriate office of IRS*
Graham	Honolulu, HA	1972	Honolulu, HA
Hermann	Los Angeles, CA	1975	Fresno, CA
Maynard	Rialto, CA	1977	Fresno, CA

Petitioners were at all relevant times Scientologists. Scientology [5] teaches that the individual is a spiritual being having a mind and a body. Part of the mind, called the "reactive mind" is unconscious. It is filled with mental images that are frequently the source of irrational behavior. Through the administration of a Scientology process known as "auditing," an individual, called a "preclear," is helped to erase his reactive mind and gain spiritual competence. Auditing is also referred to as "processing," "counseling," and "pastoral counseling."

Scientologists believe that they can attain benefits from auditing and training, but only in degrees or steps. These include levels called "Grades" and higher levels called "OT sections." The various steps or degrees of accomplishment are set forth in a chart entitled "Classification Graduation and Awareness Chart of Levels and Certificates."

A trained Scientologist, known as ar. "auditor," administers the auditing. He is aided by an electronic device called an "E-meter." This device helps the auditor identify the preclear's areas of spiritual difficulty by measuring skin responses during a question and answer session. These auditing sessions are offered in fixed blocks of time called "Intensives."

One of the tenets of Scientology is that, anytime a person receives something, he must pay something back.

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[5] For an indepth review of the Scientology religion and its structure, see *Church of Scientology of California v. Commissioner*, 83 T.C. 381 (1984).

This is called the doctrine of exchange. The Church of Scientology applies this doctrine by charging a "fixed donation" for training and auditing. With few exceptions, these services are never given for free.[6] Thus, fixed donations are generally a prerequisite to a person's receiving auditing and training. These fixed donation payments constitute the majority of the Church of Scientology's funds, and are used to pay the costs of church operations and activities.

The general rates of the fixed donations for auditing in 1972 were as follows:

12½-Hour intensive	$ 625
25-Hour intensive	1,250
50-Hour intensive	2,350
75-Hour intensive	3,350
100-Hour intensive	[7]4,250

In addition, the Church of Scientology offered two specialized types of auditing for a higher fixed donation—

Integrity Processing	$750 per 12½-Hour intensive
Expanded Dianetics	$950 per 12½-Hour intensive

---

[6] The Church of Scientology has a nine-volume encyclopedia of Scientology policy called the OEC series. Hubbard Communications Office Policy Letter (HCO PL) Sept. 27, 1970 (Issue I), 3 OEC 89, describes the Church of Scientology's policy against free services and price cutting. It states:

Price cuts are forbidden under any guise.

1. PROCESSING MAY NEVER BE GIVEN AWAY BY AN ORG. Processing is too expensive to deliver.

* * * *

9. ONLY FULLY CONTRACTED STAFF IS AWARDED FREE SERVICE, AND THIS IS DONE BY INVOICE AND LEGAL NOTE *WHICH BECOMES DUE AND PAYABLE IF THE CONTRACT IS BROKEN*. [Emphasis added.]

[7] Historically, the price of a 25-hour intensive was fixed at an amount equal to 3 months of pay for the average middle-class worker in the district of the Scientology Church providing the service.

Members of the Church of Scientology are encouraged to make advance payments for Scientology courses. If payment is made well in advance of the services to be rendered, a discount of 5 percent can be obtained by the member. When a parishioner makes an advance payment, the Church credits his account. Once the individual begins receiving a service, his account is debited. It is the Church of Scientology's policy to refund advance payments upon request at any time before services are received.[8]

The Church of Scientology operates in a commercial manner in providing these religious services. In fact, one of its articulated goals is to make money. This is expressed in HCO PL March 9, 1972, MS OEC 381, 384. It sets out the governing policy of the Church of Scientology's financial offices by exhorting these offices to "MAKE MONEY. * * * MAKE MONEY. * * * MAKE MORE MONEY. * * * MAKE OTHER PEOPLE PRODUCE SO AS TO MAKE MONEY." The goal of making money permeates virtually all of the Church of Scientology's activities—its services, its pricing policies, its dissemination practices, and its management decisions.

The Church of Scientology promotes its services through free lectures, congresses, free personality tests, and handouts. Advertisements are placed in newspapers, magazines, and on the radio. These promotional activities are geared to be responsive to community concerns, which are determined from surveys.

In 1972, Graham made payments totaling $1,682 to the Church of Scientology, Hawaii, and to the Scientology and Dianetic Center of Hawaii. Of this amount, approximately $400 went towards training, the balance went for auditing. These payments were for the Hub-

[8] No evidence was produced with respect to the actual amounts, if any, of such refunds during the tax years in issue.

bard Qualified Scientologist course (HQS), Communications course, and auditing. Some of the payments toward courses were for Graham's daughters, Karen and Laurel. When Graham made those payments, she expected to receive, and did receive, the benefit of those services. On her 1972 income tax return, Graham deducted $1,682 as a charitable contribution.

In 1975, Hermann paid the Church of Scientology, American Saint Hill Organization (ASHO) $4,875. At the time Hermann made these transfers, he expected to receive Class 0 to 9 training. While Hermann did not take these courses, he did take other Scientology courses and has received auditing between 1974 and the present. On his 1975 income tax return, Hermann deducted $3,922 as a charitable contribution.

In 1977, Maynard paid the Church of Scientology, Mission of Riverside, $4,698.91 as advance payments for services. While Maynard did not receive any services in 1977, he made those remittances with the expectation of taking Interiorization Processing, Expanded Dianetics, and auditing. On his 1977 income tax return, Maynard claimed a $5,000[9] charitable contribution deduction.

In the respective notices of deficiency, respondent disallowed these claimed charitable contribution deductions. Respondent maintains that it was not established that the payments to the Church of Scientology were contributions or gifts rather than payments for services or merchandise.

Issue 1. Deductibility of Payments Made

The taxpayer has the burden of proving that a particular payment is a "contribution or gift." *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934); *Welsh v. Helvering*, 290 U.S. 111 (1933); Rule 142(a), Tax

[9] This amount consisted of a $2,385 carryover from 1976 transfers and $2,615 for transfers in 1977.

Court Rules of Practice and Procedure. Petitioners argue that their remittances to the Church of Scientology met the statutory requirements of section 170, subsections (a) and (c), and thus were deductible charitable contributions. Respondent maintains that those payments were not "contribution[s] or gift[s]" within the meaning of section 170(c). Rather, he insists they were made to purchase services, i.e., a quid pro quo, and thus were nondeductible personal expenditures.

Section 170(a)(1) allows as a deduction any charitable contribution payment which is made within the taxable year. Section 170(c) defines the term "charitable contribution" as "a contribution or gift." Neither section 170 nor the regulations further elaborate on the meaning of "charitable" contribution." This issue was addressed, however, in *DeJong v. Commissioner*, 36 T.C. 896 (1961), affd. 309 F.2d 373 (9th Cir. 1962). There, the Court stated—

> As used in this section the term "charitable contribution" is synonymous with the word "gift." * * * A gift is generally defined as a *voluntary transfer* of property by the owner to another *without consideration* therefor. If a payment proceeds primarily from the incentive of anticipated benefit of the payor beyond the satisfaction which flows from the performance of a generous act, it is not a gift. * * * [*DeJong v. Commissioner*, *supra* at 899. Citations omitted; emphasis added.]

Petitioners wanted to receive the benefit of various religious services provided by the Church of Scientology. The Church of Scientology, however, generally provided those services only if they were purchased. To encourage such purchases, the Church of Scientology gave a 5-percent discount to parishioners who made advance payments. A person who made an advance payment but chose not to receive the services could request a refund of

his money. Petitioners thus made payments to the Church in exchange for those services.

The record demonstrates clearly that these payments were not voluntary transfers without consideration, but were made with the expectation of receiving a commensurate benefit in return. In addition, where contributions are made with the expectation of receiving a benefit, and such benefit is received, the transfer is not a charitable contribution, but rather a quid pro quo. *Haak v. United States*, 451 F. Supp. 1087, 1090-1091 (W.D. Mich. 1978).

Petitioners Graham and Hermann made payments for which they received religious services. They received a perceived benefit from their transfers. Petitioner Maynard made advance payments to the Church of Scientology. While he did not receive any religious services in 1977, his account was credited for his remittances. This credit entitled him to receipt of services in the future. It was that entitlement which constituted his receipt of a perceived benefit, or the quid pro quo.

Accordingly, none of the payments petitioners made were charitable contributions within the meaning of section 170(c). Instead, they were nondeductible personal expenditures.

Issue 2. Constitutional Arguments

Petitioners maintain that denial of the deduction interferes with their constitutional right to the free exercise of their religion. It is well established that there is no constitutional right to a tax deduction. Benefits granted to taxpayers, such as deductions for charitable contributions, are matters of legislative grace. *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593 (1943); *New Colonial Ice Co. v. Hervering*, *supra* at 440; *Winters v. Commissioner*, 468 F.2d 778, 781 (2d Cir. 1972), affg. a Memorandum Opinion of this Court. Further, denial of this deduction does not violate the free

exercise clause of the First Amendment. *Parker v. Commissioner*, 365 F.2d 792, 795 (8th Cir. 1966), cert. denied 385 U.S. 1026 (1967); *Winters v. Commissioner*, *supra* at 781. The constitutionality of the denial of this deduction was well stated by the Supreme Court in *Cammarano v. United States*, 358 U.S. 498, 513 (1959)—

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. * * *

Respondent is not precluding petitioners from engaging in constitutionally protected activities. Petitioners may practice their beliefs; they just will not be subsidized for them.

Even if denial of the deduction interfered with petitioners' practice of their religious beliefs, not all burdens on religion are unconstitutional. *United States v. Lee*, 455 U.S. 252, 257 (1982). See also, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 163-166 (1944); *Reynolds v. United States*, 98 U.S. 145, 166-167 (1878). The limitation on religious liberty can be justified by showing that it is essential to accomplish an overriding governmental interest. *United States v. Lee*, *supra* at 257-258. The Supreme Court has stated that "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." *United States v. Lee*, *supra* at 260.

Petitioners also argue that denial of the deductions violates the establishment clause of the First Amendment.[10] Their argument is twofold. First, disallowance

[10] Petitioners raised similar establishment clause arguments in *Church of Scientology of California v. Commissioner*, 83 T.C. at

would result in disparate treatment of petitioners, in violation of the neutrality requirement of the First Amendment. Second, disallowance would be the result of excessive Government entanglement with religion, in violation of the First Amendment.

Petitioners place heavy emphasis on *Larson v. Valente*, 456 U.S. 228 (1982). In that case, Minnesota had enacted a statute imposing registration and reporting requirements on religious groups which solicited more than 50 percent of their contributions from nonmembers. The Supreme Court held that the statute violated the establishment clause of the First Amendment. In so doing, they rejected an argument that the statute was facially neutral and found instead that it made "explicit and deliberate distinctions between different religious organizations." *Larson v. Valente, supra* at 247 n. 23. The Court further mentioned that "The fifty percent rule of section 309.515, subd. 1(b), effects the *selective* legislative imposition of burdens and advantages upon particular denominations." *Larson v. Valente, supra* at 253-254.

The instant case is distinguishable from *Larson* because section 70, unlike the charitable solicitation law in *Larson*, does not make classifications among religions. Furthermore, unlike *Larson*, here there is no legislative history revealing overt discrimination. Finally, even if section 170 has the effect of advancing one religion more than another, that fact alone does not make the statute unconstitutional. The establishment clause does not prohibit a statute from having a disparate impact on religious organizations provided the disparate impact results from the application of secular criteria. *Lynch v. Donnelly*, 465 U.S. ——, —— (1984); *Gillette v. United*

447-454. While that case dealt with the constitutionality of sec. 501(c)(3), its rationale is fully applicable to sec. 170 and we incorporate herein by this reference that portion of the opinion.

States, 401 U.S. 437, 452 (1971); *McGowan v. Maryland*, 366 U.S. 420, 442-444 (1961). Here the tests for determining the deductibility of claimed charitable contributions are based on secular criteria. Further, *Larson* is distinguishable from the case at bar because the section 170 classification bears equally upon all religious organizations. Thus, there is not the political divisiveness here that was prevalent in *Larson*. Accordingly, the argument of unconstitutionality under the establishment clause is rejected.

Finally, petitioners insist that denial of the claimed deductions was due to selective discriminatory action. They claim that their rights under the First Amendment and the equal protection component of the due process clause of the Fifth Amendment were violated. The evidence in this case does not demonstrate that any discriminatory action was taken against petitioners by respondent or any of his agents. Petitioners have failed to prove that violation of their rights occurred under either the First or Fifth Amendments.[11]

Decisions will be entered for the respondent.

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[11] This issue of selective enforcement was also raised and rejected in *Church of Scientology of California v. Commissioner*, 83 T.C. at 453-454.

APPENDIX H

A.R.M. 2, 1 C.B. 150 (1919)

Section 214 (a) 11, Article 251: Charitable contributions.

The Committee is of the opinion that the distinction of pew rents, assessments, church dues, and the like from basket collections is hardly warranted by the act. The act reads "contributions" and "gifts." It is felt that all of these come within the two terms.

In substance it is believed that there are simply methods of contributing, although in form they may vary. Is a basket collection given involuntarily to be distinguished from an envelope system, the latter being regarded as "dues"? From a technical angle, the pew rents may be differentiated, but in practice the so-called "personal accommodation" they may afford is conjectural. It is believed that the real intent is to contribute and not to hire a seat or a pew for personal accommodation. In fact, basket contributors sometimes receive the same accommodation informally. On these grounds, the Committee is of the opinion that ordinarily and customarily pew rents, as well as so-called assessments and so-called dues, are to be regarded as contributions.

It is accordingly recommended that this interpretation be adopted.

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-557

ETHEL B. MILLER,
Applicant,

v.

INTERNAL REVENUE SERVICE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 3, 1988.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 25th day of January, 1988.